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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 472

CHAUFFEURS, TEAMSTERS AND HELPERS "GENERAL" LOCAL NO. 200, Affiliated With the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the District of Columbia Circuit.

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NATIONAL LABOR RELATIONS BOARD,
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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the District of Columbia Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on May 27, 1966.

CITATIONS TO OPINIONS BELOW.

The decision and order of the National Labor Relations Board are reported at 155 NLRB No. 31 (R. 106-132)[1] and are printed in Appendix "B", *infra*, pages 10-39 of this petition.

The court below issued no opinion but affirmed the decision of the Board *per curiam*. The judgment of the court is printed in Appendix "A", *infra*, page 9 of this petition.

JURISDICTION.

The judgment of the court below was entered on May 27, 1966. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION INVOLVED.

Whether the National Labor Relations Board had subject matter jurisdiction to hold that two employees were illegally discharged for not maintaining union membership as required by the terms of a collective bargaining agreement valid under federal law but which allegedly failed to satisfy the requirements of state law.

STATUTES INVOLVED.

The federal statutory provisions involved are Sections 7, 8 (b) (2), and 8 (a) (3) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C., Section 151 *et seq.*, referred to as the "Act"). The Wisconsin statute involved is Section 111.06 (1) (c) 1. The federal and state statutes are printed in Appendix "C", *infra*, pages 40-43 of this petition.

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[1] "R." refers to the printed Joint Appendix filed in the court below.

STATEMENT.

Petitioner, Chauffeurs, Teamsters and Helpers "General" Local 200, is the collective bargaining representative for truck drivers employed by the members of the Allied Construction Employers Association, an employer association located in Milwaukee, Wisconsin. State Sand and Gravel Company and Hillview Sand and Gravel Company, the employers of the two charging parties, are members of the Association and both are parties to labor agreements with the Union. The employers were never charged with violating the Act.

Petitioner has had continuous collective bargaining agreements with ACEA or its predecessor association since prior to May 5, 1939, and each agreement contained a union-security provision which required membership as a condition of continued employment (Appendix "B", *infra*, pages 15-16, R. 18, 59, 103).

The recent contracts negotiated between the Association and the Union compelled employees to become and remain Union members as a condition of employment after the thirty-day grace period required by federal law. It also contained the following sentence:

> "The provisions of this subsection shall not be enforced unless the requirements of state law, **if any**, are met." (Emphasis ours.)

The Union consistently maintained, at all material times, that there were **no** state law requirements that barred enforcement of this contract to these two employees.

Under Wisconsin law, union membership may be compelled by contract only if one of the following three conditions are met:

> (a) There has been a separate referendum in which two-thirds of the employees authorize the agreement;

(b) Contracts compelling membership have been in existence since May 5, 1939 (the effective date of the state law);

(c) The employees involved are employed in the building and construction industry and perform work on construction sites (added in 1961).

No referendum was conducted until August, 1963. However, the position of the Union, constantly maintained through the years, was that no referendum was required because the parties had been in a continuous contractual relationship on this subject since 1939.[2]

The Union also asserted that the employees were working in the construction industry within the meaning of state law, but there has been no construction of this 1961 amendment by the state agency.

In 1963, the Petitioner and the Employer Association stipulated to a referendum. On August 21, 1963, the Wisconsin Employment Relations Board certified that the employees had voted 360 to 44 in favor of the all-union agreement (Appendix "B", *infra,* page 24, R. 88-89).

On October 4, 1963, the Petitioner notified all delinquent employees to come to the Union office and make arrangements for reinstatement to membership or a request for their discharge would be made (Appendix "B", *infra,* page 25, R. 91). Neither of the two charging parties responded to the letter within the one week deadline. In fact, neither of the employees had made any tender whatsoever after the referendum and prior to the letter requesting their discharge. Nevertheless, the Board found

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[2] If this fact were found by the state agency (Wisconsin Employment Relations Board), there would have been no violation of state law, nor, under the Board's theory, of federal law either. *Racine Millwork and Supply Co.,* WERB Dec. 6526-B, 57 LRRM 1168 (1964).

that the requests for the discharge of these two men were based upon a dues delinquency dating from 1959, a period prior to the referendum (Appendix "B", *infra*, page 16). The Board rejected Petitioner's contention that it could legally insist on these dues which accrued prior to the referendum because of operation of state law. The Board found that the parties *intended* to defer the effective date of the compulsory union membership provisions of the Agreement until a referendum was held (Appendix "B" *infra*, page 16). The Board held that this "intention" to defer enforcement of the clause rendered it ineffective and the discharges under it were untimely and, therefore, illegal.

REASONS FOR GRANTING THE WRIT.

The critical finding by the Board is that by their reference to state law, the parties "intended" to defer the effectiveness of the union-security agreement until the state referendum was conducted. However, the reference to the state law on this special subject matter of compulsory unionism requires the federal agency to eschew jurisdiction in favor of the state agency. *Retail Clerks Int. Asso. v. Schermerhorn*, 375 U. S. 96.

While it is true that the parties to a collective bargaining agreement may defer its effectiveness to a future date, or make its enforcement contingent upon certain events, when the selected contingency is application of *state* law, established federal policy requires the *state* agencies to discern and interpret the state law.

To find a violation of law, it was essential for the National Labor Relations Board not only to find the intention of the parties, but also to construe and apply state law. The Board stated that "[U]nder Wisconsin law, an employer and a union may not enter into an all-Union, i. e., a union-security agreement, unless two-

thirds of the employees involved who vote approve such agreement" (Appendix "B", *infra*, page 12).

This was an erroneous construction of state law and it also runs contrary to the decision of this Court in *Retail Clerks Int. Asso. v. Schermerhorn*, 375 U. S. 96. In that case, this Court said (375 U. S. at p. 103):

> "It is argued that if there is a violation of a state union-security law authorized by § 14 (b), it is a federal unfair labor practice and that the federal remedy is the exclusive one. It is urged that that course is necessary, if uniformity is to be achieved. But § 14 (b) gives the States power to outlaw even a union-security agreement that passes muster by federal standards. *Where Congress gives state policy that degree of overriding authority, we are reluctant to conclude that it is nonetheless enforceable by the federal agency in Washington*" (emphasis ours).

The effect of the Board decision is far reaching because it opens the door to conflicting interpretations of state law by federal and state tribunals at a time when the trend in collective bargaining is to negotiate agreements with single employers and associations of employers which have application in many states.[3] Compulsory membership is an integral part of these agreements and constitutes a potential source of conflict where differing views find expression in state laws. The addition of a qualifying sentence, such as that used in this agreement, soothes

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[3] The following contracts, reproduced in text by the Bureau of National Affairs, "Collective Bargaining Negotiations and Contracts", Binder No. 1, contain similar references preserving the application of state law to union security agreements: *General Motors and UAW*, Title 20: p. 302, Section 4 (b); *Goodyear Co. and Rubber Workers*, Title 21: p. 904, Section 3; *U. S. Steel and Steel Workers*, Title 22: p. 147, Section 5 (A) [31 b] and [31 c]; *National Master Freight Agreement and Teamsters*, Title 27: p. 734, Article 3, Section 1 (b).

local legal objections by permitting application of local policy to this one subject matter. Until such time as Section 14 (b) of the Act is amended or repealed, this jurisdiction must be respected and federal power over the subject matter withheld.

State regulation or interference with the making or enforcement of collective bargaining agreements in industries which affect interstate commerce is not permitted because the federal government has pre-empted this field. *Local 24 IBT v. Oliver,* 358 U. S. 283, 296; *Textile Workers Union of America v. Lincoln Mills,* 353 U. S. 448.

However, one provision of the agreement remains subject to state regulation—that involving compulsory unionism. *Algoma Plywood & Veneer Co. v. WERB,* 336 U. S. 301 [Sec. 14 (b), Appendix "C", *infra,* page 42].

In Wisconsin, it is the referendum problem which must be met in negotiations. In some states, it is the "agency shop" problem which must be discussed and satisfied. In Indiana, it may be negotiated and enforced under state law. *Meade Electric Co. v Hagberg,* 159 N. E. (2) 408. Cf. *NLRB v. General Motors Corp.,* 373 U. S. 734.[4]

In other states, the "agency shop" may not be made compulsory under local law. *Retail Clerks Int. Assoc. v. Schermerhorn,* 373 U. S. 746, 757 [involving the Florida statute, *Schermerhorn v. Retail Clerks,* 141 So. (2) 269]. If the agreement complies with *state* law, there should be no recourse to the federal agency.

The whole confusing and checkered pattern of the application of state law to these agreements could be obviated by congressional action, but such action has not

[4] The state statute which gave rise to this litigation was repealed in 1965.

been taken. Until it is, the states are free to construe and apply their applicable law to the union-security agreements, and parties aggrieved by the application of a union-security agreement, which allegedly fails to meet the requirements of state law, must apply to appropriate state agencies for relief.

The charging parties in the case at bar applied to the federal agency for relief on a problem which involved interpretation and application of the state law. The relief should have been denied and the parties instructed to apply to the appropriate state agency.

CONCLUSION.

For the reasons stated, this petition should be granted.

Respectfully submitted,

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